

FCC MAIL SECTION

Before the  
Federal Communications Commission  
Washington, D.C. 20554

MM Docket No. 92-6 ✓

In re Application of

NORMANDY File No. BRH-910129UR  
BROADCASTING CORP.

For Renewal of License of  
Station WYLR(FM)  
Glens Falls, New York)

and

LAWRENCE N. BRANDT File No. BPH-910430MB

For a Construction Permit  
for a New FM Station on 95.9 MHz  
at Glens Falls, New York

#### Appearances

*Christopher P. Lynch, Pro Se* for Normandy Broadcasting Corp.; *David Tillotson, Esq.* and *Kathleen L. Franco, Esq.*, on behalf of Lawrence N. Brandt; *Charles E. Dziedzic, Esq.*; *Y. Paulette Laden, Esq.*, and *Gary P. Schonman, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

#### INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: December 18, 1992; Released: December 30, 1992

#### PRELIMINARY STATEMENT

1. This proceeding was commenced on January 21, 1992, by *Hearing Designation Order*, DA 92-11, reported at 7 F.C.C. Rcd 509 (MM Bur. 1992) ("*HDO*"), setting down for hearing the application of Normandy Broadcasting Corp. ("Normandy") the renewal of its license for Station WYLR(FM) ("WYLR") at Glens Falls, New York and the mutually exclusive application of Lawrence N. Brandt ("Brandt") for a construction permit for a new FM station to operate on the same frequency as WYLR. The Commission was represented in the proceeding by the Mass Media Bureau ("Bureau").

2. An issue was designated by the Bureau on a possible hazard to air navigation relating to the location and the height of Brandt's proposed antenna. The issue was re-

solved in Brandt's favor by an interlocutory ruling of the Presiding Judge which was based on an unopposed motion. See *Order* FCC 92M-200, released February 13, 1992. Three other issues set in the *HDO* were tried at hearing and are initially resolved herein. The issues are:

- a) To determine whether the findings and conclusions about the character qualifications of Normandy in *Barry Skidelsky*, 6 FCC Rcd 2221 (ALJ 1991), should disqualify Normandy in the Glens Falls renewal proceeding.<sup>1</sup>
- (b) To determine which of the proposals would, on a comparative basis, best serve the public interest.
- (c) To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

3. Normandy was a mutually exclusive applicant for an FM permit for a new station that had been allocated to Queensbury, New York (MM Docket 90-181). The case was designated for hearing on March 15, 1990, and thereafter went to hearing. Administrative Law Judge Edward J. Kuhlmann found Normandy to be disqualified for having provided untruthful information in its threshold showing of the non-entertainment programming of WYLR, for misrepresenting its reasonable assurance of a transmitter site, and for having failed to disclose a creditor's contingent ownership interest in Normandy. *Barry Skidelsky*, 6 F.C.C. Rcd 2221 (Admin. L.J. 1991). The Review Board affirmed Normandy's disqualification for lacking reasonable assurance of a transmitter site. *Barry Skidelsky*, 7 F.C.C. Rcd 1 (Review Bd 1992). But the Review Board declined to review the character issues that had been decided against Normandy and held in that regard:

Because Normandy is disqualified on the basic site issue, we need not go further to determine whether Normandy's conduct amounted to misrepresentation.

*Id.* at 8 (footnote omitted). The Review Board denied the Bureau's petition for reconsideration of its refusal to review Normandy's character issues. The Review Board was aware that this renewal proceeding had been commenced and held that the character issues decided against Normandy in Queensbury are "now more directly relevant to the WYLR(FM) renewal proceeding." *Barry Skidelsky*, 7 F.C.C. Rcd 1392-93 (Review Bd 1992) (hereafter "*Skidelsky Recon.*"). However, the Review Board instructed that the Presiding Judge in this proceeding "should not relitigate the programming misrepresentation issue tried in this instant [Queensbury] proceeding." *Skidelsky Recon.* at 1393. It is noted that in the course of the appeal, Normandy sought review only of the transmitter site issue which was the only issue that the Review Board has addressed. Normandy had not sought review of the misrepresentation issues which the *Skidelsky* judge had found against Normandy. On April 3, 1992, Normandy petitioned for dismissal of its application in Queensbury.

<sup>1</sup> The *Skidelsky* issue as set in the *HDO* was modified by the Presiding Judge to conform to a later ruling of the Review Board which was made after issuance of the *HDO*. See *Order*

FCC 92M-281, released March 26, 1992, and the Review Board's ruling at 92R-16, released February 19, 1992, and published at 7 F.C.C. Rcd 1392 (Review Bd 1992).

4. The Review Board gave procedural direction to the course of the litigation of this renewal case. In *Ocean Pines FM Broadcasting Partnership*, 4 F.C.C. Rcd 3490 (Review Bd 1989) the Review Board held that the presiding judge in that case did not err in adding an issue which would take into account the real party-in-interest findings and conclusions of another judge who had presided in a parallel proceeding. The Review Board stated in its *Skidelsky Recon.* ruling that the same protocol should be employed here.

5. After the *Skidelsky Recon.*, Brandt filed a motion for summary decision on the *Skidelsky* issue and asked that Normandy be declared unqualified without further hearing. The motion was denied by the Presiding Judge because there remains to be considered any additional evidence that Normandy believes to be exculpatory. See *Memorandum Opinion and Order*, FCC 92M-560, released May 15, 1992. The Review Board acknowledged in its *Skidelsky Recon.* that "exculpatory" evidence would be relevant to the issue of Normandy's qualifications to hold a broadcasting license.<sup>2</sup> See *Skidelsky Recon.*, 7 F.C.C. Rcd at 1393, Para. 10. Such evidence was received in the hearing phase of this case while adhering to the standard of collateral estoppel with respect to the *Skidelsky* issue on Normandy's character.

6. An admissions hearing session was held on August 4, 1992, which was limited to the receipt of documentary evidence, rulings on the permissibility of cross-examination of certain non-party public witnesses, the scope of proposed exculpatory evidence, and any possible rebuttal of such evidence. See *Order* FCC 92M-850, released August 7, 1992. See also *Order* FCC 92M-920, released August 27, 1992 (permitting speakerphone cross-examination of two non-party witnesses and requiring in court cross-examination of two non-party witnesses). A testimonial hearing was held on September 1, 1992, and the record was closed on that same date. See *Order* FCC 92M-931, released September 3, 1992. The parties were required to submit their proposed findings of fact and conclusions of law ("PFC") on October 9, 1992, and their reply findings and conclusions ("RPFC") on October 30, 1992. The Bureau's PFC was limited to the *Skidelsky* issue and renewal expectancy, and the Bureau did not file any RPFC.

#### FINDINGS OF FACT

7. The burden of proof with respect to the exculpation of Normandy from the disqualifying findings and conclusions on the *Skidelsky* issue remains with Normandy. Therefore, Normandy must show by the preponderance of the evidence that its operation of Station WYLR(FM) during the relevant renewal period was sufficient to offset the adverse findings of character disqualification that were made in *Skidelsky*. See *KQED, Inc.* 5 F.C.C. Rcd 1784-85 (Comm'n 1990) [subsequent history omitted] (Comm'n findings of misrepresentation concerning one station does not require denial of renewal for other stations but meritorious programming will not mitigate serious deliberate misconduct such as misrepresentations to the Commission). See also Presiding Judge's *Memorandum Opinion and Order*, FCC

92M-560, *supra*. A consolidated factual hearing was conducted on all issues wherein the parties presented evidence and were afforded the opportunity to conduct cross-examination. *Ashbacker Radio Corp. v. F.C.C.*, 325 U.S. 327, 333 (1945); *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956) (parties to comparative broadcast hearings have right to present oral and documentary evidence and to conduct cross-examination).

#### The Applicant Parties

##### Normandy Broadcasting Corp.

8. Normandy is a New York corporation all of whose stock is owned by Christopher P. Lynch ("Lynch"). (Normandy Exh.1.) Normandy is the current licensee of FM Station WYLR and of Am Station WWSC, Glens Falls, New York ("WWSC"). (Brandt Exh.2.)

9. Lynch intends to continue to devote forty hours or more per week as the general manager of Station WYLR(FM). (Normandy Exh.2.) Lynch has been a resident of Queensbury, New York, a community which is within WYLR's service area, since 1984. He has owned and operated Station WYLR(FM) since 1984. Lynch's civic activities include the Vietnam Veterans of America for which he served as chairman of the board from 1975 to 1978. Lynch also served on the board of directors of Planned Parenthood and the Lower Adirondack Regional Arts Council with whom he holds an honorary lifetime membership. (Normandy Exh. 3, Pp.1-6.) Additional civic involvements of Lynch are set forth in Paras. 29, 33 below.

10. Normandy will continue to provide auxiliary power for Station WYLR(FM) and Normandy is in the process of acquiring an emergency generator for WYLR's tower site. (Normandy Exh. 5.)

##### Lawrence N. Brandt

11. Brandt is an individual applicant. If his application is granted, Brandt will own and operate the station as sole proprietor. (Brandt Exh.1.) He does not propose to be integrated into the day-to-day operations of the station. (Id.)

12. Brandt will install auxiliary power generators at both the transmitter and studio sites of the station to ensure that the station will be able to remain on the air in the event of a power failure. (Id.)

#### Diversification

13. Normandy has not made any commitment to divest itself of WWSC and Normandy has represented on-the-record that it intends to continue to own and operate WWSC if its renewal for Station WYLR(FM) is granted. (Admission Sess. Tr. 237.)

14. Brandt has interests in multichannel multipoint dis-

<sup>2</sup> Evidence was received which might also be characterized as mitigating evidence. "Exculpate" means excuse or justification while "mitigation" means an abatement or diminution of a penalty. *Black's Law Dictionary* (4th Ed) at 675, 1153. Compare

*Skidelsky Recon.* at 1393 (additional evidence that is "exculpatory") and *United Broadcasting Co.*, 86 F.C.C. 2d 452, 459 (Comm'n 1981) (United may introduce "mitigating" evidence). For purposes here the terms "exculpation" and "mitigation"

tribution systems ("MMDS")<sup>3</sup> in five communities: Cleveland, OH; Buffalo, NY; Elmira, NY; Columbus OH; and Florence, SC. He has no other interests in a means of mass communications. (Brandt Exh.1.)

#### The Skidelsky Issue

15. Character issues were set by the *Skidelsky* judge against Normandy and the following summary conclusions were made:

- (a) Normandy has not demonstrated that it had reasonable assurance for its first antenna site; its certification that it did have reasonable assurance was not corroborated by any evidence outside of the testimony of Christopher Lynch.
- (b) Normandy's threshold showing on its non-entertainment programming was carelessly prepared; it could not be relied on and was in material respects untruthful.
- (c) Normandy failed to report a contingent ownership interest and Mr. Lynch's explanation for not doing so is disingenuous.

*Skidelsky*, 6 F.C.C. Rcd 2221, 2228-30 (Admin.L.J. 1991). The judge concluded with respect to the totality of Normandy's fitness for a license:

Normandy is disqualified to operate the proposed Queensbury facility because it has not established that it can be relied on to provide truthful information to the government.

*Id.* at 2232.

16. The Review Board addressed only the merits of the findings and conclusions insofar as they determined that Normandy did not have a reasonable assurance of a site when it certified affirmatively in its Form 301. See 7 F.C.C. Rcd, *supra* at 1-2. Since on appeal Normandy was found to be basically unqualified, the Review Board specifically declined to review the record to determine whether Normandy's conduct with respect to its certification of a reasonable assurance "amounted to misrepresentation." *Id.* at 8. In a related footnote, the Review Board advised that because it found Normandy unqualified in that it lacked a transmitter site, it need not and would not reach the issues raised on appeal with respect to site certification, threshold showing, and undisclosed contingent ownership interest. *Id.* 8 fn.12. Therefore, under principles of collateral estoppel and the issue added by the Review Board, Para. 2, *supra*, the findings and conclusions of Judge Kuhlmann with respect to Normandy's character and truthfulness as they relate to the three subjects of site certification, threshold showing, and disclosure of contingent ownership interest are adopted as written. See 6 F.C.C. Rcd at 2221-2232. See also Fn.9, *infra*.

#### Exculpatory/Mitigating Evidence

17. The bureau refers to favorable evidence of Normandy's "service on behalf of a large number of community organizations." Specifically, the Bureau cites evidence of Lynch's participation in community activities and his honorable voluntary service in the United States Army. (Normandy Exh. 3 at Pp. 2-3, 5-6 and 61.) The Bureau also refers to Normandy's reliance on its "efforts to ensure and improve compliance with Commission rules and policies" which include attendance at a conference of the National Association of Broadcasters ("NAB"). (Normandy Exh. 8.) The Bureau urges that such evidence sufficiently mitigates the misrepresentations in *Skidelsky* to warrant a renewal of Normandy's license to operate Station WYLR(FM). See Bureau's PFC at 5, 8-11.

18. Normandy relies on evidence which it introduced concerning its programming record. (Normandy Exh.6.) Normandy also cites to a sworn statement of Lynch which was rejected because it attempts to relitigate the *Skidelsky* issues. (Normandy Exh. 7 for *id.*; Tr.415-18.) Normandy will not be permitted to rely on evidence which the Review Board has excluded from consideration in order to attempt to meet its burden of proof on exculpation. However, evidence of the scope and efforts of Normandy's ascertainment that occurred within the renewal period will be considered in conjunction with evidence of exculpation and mitigation. (See Para. 62 and n.11, *infra*.)

19. The consideration of Normandy's evidence on exculpation and mitigation was subject to certain evidentiary rulings which excluded portions of Normandy's Exh. 6, a document entitled "Programming Record" that related to the renewal expectancy. (See Tr.352-416.) Unless specifically indicated otherwise, the findings in Paras. 20-23, *infra* are based on Normandy Exh. 6. Because of the credibility issues raised by Brandt about the accuracy and reliability of Normandy's programming records that are relied upon by Normandy for exculpation and mitigation, these preliminary findings in Paras. 20-23 are selected by the Presiding Judge from Normandy Exh. 6 to explain how Normandy is structured and functions in furtherance of the public service responsibilities of Stations WWSC(AM) and WYLR(FM). To the extent such evidence shows a likelihood of WYLR's future truthfulness, candor or competence in dealings with the Commission it will be considered in mitigation.

20. The evidence shows that Station WYLR(FM) operates full time and broadcasts an entertainment format that is directed to an audience of young adults. Stations WWSC(AM) and WYLR(FM) have co-located studios at the same address in Glens Falls. The stations simulcast on a limited basis whereby they share common news, engineering and administration personnel. Lynch owns and manages both stations. Lynch asserted that the "bulk" of WYLR's public service announcements ("PSAs") were broadcast during "premium time" which was identified as being from 6:00 am to 7:00 pm. WYLR's service to the community includes regularly scheduled news, sports and weather. There are also PSAs to address "ascertained" community needs. Ascertainment for both stations is conducted by four members of Normandy's staff, including Lynch. During the renewal period Lynch and his staff claim to

will be used interchangeably.

<sup>3</sup> A multichannel multipoint distribution system is a television delivery system utilizing line-of-sight microwave with four or

more channels operated by a single owner, sometimes referred to as "wireless cable." *Channels/Field Guide* 1988 at 130. See 47 C.F.R. §21.900 *et seq.* (Multipoint Distribution Service).

have interviewed fifty two public service organizations which are identified in the exhibit. Ascertainment is aided by actual participation of WYLR personnel in the activities of certain of the organizations and by being receptive to approaches from the organizations. (Normandy Exh. 6 at 3-4.)

21. Normandy emphasizes local news for both stations. The local news stories are written primarily by joint station staffers from independent research and by rewriting wire stories for the benefit of local listeners. For the purpose of gathering local news, Normandy contacts thirty identified sources such as police and fire departments and the mayor's office. Over the license term, WYLR broadcasts 55 local newscasts each week. These newscasts are referred to as "formally logged news". In addition, Normandy represents that it integrates "non-logged news items" into Normandy's daily format.

22. Normandy's stations are located in an area of the country which experiences bad weather conditions. Station WYLR(FM) regularly broadcasts emergency news about traffic and road hazards, weather emergencies, and power outages. To meet these needs, Normandy contracts with a private weather forecasting service which provides WWSC and WYLR with regular forecasts and severe weather warnings. To further address these needs, Normandy has formulated for the two stations, through a common public service director, a system for warning area residents of ensuing storms. Normandy's system involves assigning each local school a coded password which facilitates the reporting of school and business closings and meeting postponements. On extremely busy bad weather days, WYLR(FM) covers the weather developments through its news programs, special reports and ongoing live coverage.

23. WWSC and WYLR share a common public service director who is responsible for taping local PSAs, for procuring national and state PSAs, and for planning the running of the PSAs. Station WYLR(FM) runs about 100 PSAs per week, some of which are taped and some of which are live. Each PSA runs for about 30 seconds and the PSAs for local service organizations account for approximately fifty percent of Station WYLR's PSAs.

24. This background on Normandy's PSA methodology will now be considered in the light of specific criticisms of Brandt. Brandt accurately states that the evidence which is advanced by Normandy to mitigate the *Skidelsky* findings consists solely of information concerning Normandy's program service. See Brandt's PFC at 4. Brandt further argues that the programming service that Normandy proposed over Station WYLR(FM) was not "meritorious" and would best be described as "minimal" in its providing for a public service. *Id.* at 4-5. It is noted that Brandt concedes that Normandy did in fact interview community leaders, members of the general public, and various groups and agencies in the Glens Falls area for ascertainment purposes. Brandt PFC at 7.

25. Normandy has introduced evidence of its issues/programs lists in its Exh.6 at Pp. 14-22. There, Normandy has set forth in columnar form: Name of Program, Dates, Days Per Week, Approximate Hours Per Day, Description. Through discovery, Brandt has reviewed Normandy's quarterly issues/programs lists which were the

source for Normandy's schematic representation. Brandt prepared as his responsive exhibits: Brandt Exhs. 3,4,5. It is established by Brandt's evidence that in 1984 and 1985, there were no records of PSAs being broadcast on Station WYLR(FM). (Brandt Exh.3.) Normandy responds in its RPFC that Brandt has mischaracterized Normandy's programming. But Normandy fails to respond to the specific point raised by Brandt regarding the absence of PSAs in the issues lists for programs in those two years. The lists for 1986 and the first two quarters of 1987 also reflect no programs for the FM station. (Brandt Exh.3 at Pp.1-15.) The exhibit had been exchanged on July 16, 1992 (*Order* FCC 92M-752) and Lynch stated in testimony that he believed that the document accurately described Normandy's lists. (Tr. 519-20.) But Lynch would not concede that the lists, which were the business records of Normandy, were accurate in describing the scope of WYLR's broadcasting. For example, regardless of any absence of a reference to WYLR on a list, Lynch testified that wherever a holiday safe driving PSA was prepared by Normandy it was broadcast on both WWSC(AM) and WYLR(FM). (Tr. 528.)

26. Lynch testified in explanation on the Presiding Judge's *voir dire*:

We have admitted, on our renewal application, that we did make some errors in our quarterly files ---. Obviously, there's some quarters where there isn't anything [on] FM. There are some quarters where things are, in my mind, very clearly missing, and the reason that we're going through this proceeding and Mr. Jacobson and Mr. Dusenbery are here, is to provide evidence that we did numerous things that did not show up either on the logs or the quarterly issues file.

(Lynch, Tr. 522-23.) Upon specific acknowledgement from Lynch that Brandt Exh.3 was based on records that relate to the programming of WYLR during the renewal period and was based on documents from the business files of Normandy, the exhibit was received in evidence. (Tr. 525.) The Bureau had no objection to its receipt in evidence. (*Id.*)

27. It is found that based on the Normandy records reflected in Brandt Exh.3 and the admissions of Lynch, there has not been a consistent broadcasting of PSAs on WYLR(FM) throughout the renewal period. This finding is consistent with a note in the *Skidelsky ID* where the trial judge found that "it is doubtful that Normandy carried any public affairs programming on WYLR." 6 F.C.C. Rcd at 2232 n.3.<sup>4</sup>

28. While Normandy relied on programming in its PFC as proof of mitigation, Normandy supplemented its broadcasting in its RPFC with additional reliance on proof of its upgraded logging techniques (citing general reference to Normandy Exhs. 6, 7 and 8); additional regularly scheduled public affairs programming over the license term; and "reams" of supporting letters, awards, and testimonials from the community. (Citing Normandy Exhs. 3, 9, and 11). See Normandy's RPFC at 2. The Bureau relies on non-broadcast evidence in support of Normandy's mitigation: service on behalf of a large number of community

<sup>4</sup> In *Skidelsky*, where there was evidence received on Normandy's poor broadcast performance, Normandy did not submit

any contemporaneous records which would corroborate Lynch's anecdotal claims about PSA broadcasting on WYLR. *Id.*

organizations (Normandy Exh. 6 at Pp. 3-6); participation in community activities by Lynch (Normandy Exh. 3 at Pp. 2-6); and Lynch's honorable discharge from the United States Army (Normandy Exh.3 at p. 61 [DD Form 214]). See Bureau's PFC.

29. The evidence contained in Normandy Exh. 6 has been considered above. See Paras. 18-23. Other evidence discloses that Lynch enlisted in the United States Army in 1967, trained in a combat unit, and served in Vietnam. He was decorated for his military service and he was honorably discharged in 1970. (Normandy Exh.3.) In 1971, Lynch became full-time manager of Stations WWSC and WYLR. He acquired 100% ownership of Normandy in 1984. (*Id.*) The evidence relied on by Normandy in mitigation further reflects that Lynch works at the two Stations in excess of forty hours per week and he serves in several community organizations. (Normandy Exh.3 at Annex A.) Lynch was recognized by the Lower Adirondack Regional Arts Council in 1974, by the Post Stroke Patients Association in 1975, by the Warren County Heart Fund in 1974, by the Fort Edward Lyons Club in 1982, by the Adirondack Community College, by the Adirondack Chapter of the Vietnam Veterans of America in 1987, and by approximately twenty four other local organizations between 1988 and 1991. (Normandy Exh. 3 at Pp. 36-60.)

30. A sworn statement of Lynch (Normandy Exh. 7) was rejected as evidence because it was ruled to be a collateral attack on the *Skidelsky ID* findings. (Tr. 417.) The document consists of a two page sworn statement of Lynch wherein he admits to committing error with regard to the threshold evidence offered by Normandy in *Skidelsky*.<sup>5</sup> Specifically, Lynch admits to having understated WYLR's total entertainment by a factor of 32%. He admits to negligence in the preparation but denies an intent to deceive. But the findings in the *Skidelsky ID* go beyond a mere failure to count accurately. For example, it was found that Lynch was not concerned about the truthfulness of the written threshold showing because he assumed that accuracy would result through cross-examination since the other applicants were familiar with WYLR's programming. *Skidelsky ID* at 2223. Also, there were findings that a program that was exclusively run on the AM Station was misrepresented as also having been run on WYLR. *Id.* That is not the type of miscalculation error that Normandy advances in its rejected Exh. 7. Therefore, even if Normandy's Exh. 7 were received in evidence it would serve to enhance the *Skidelsky* findings and not exculpate or mitigate them.

31. Normandy also relies on evidence of Lynch's attendance at a NAB conference in February 1990. (Normandy Exh. 8.) The subject matter of the conference was compliance with the Commission's renewal procedures. Lynch represents that as a result of attending that conference he gave specific instructions to his receptionist, Mrs. Jackie Ingraham, to verify all items in Normandy's public files. As she checked items in the public file she was to mark a "yes" and Lynch would rely on Mrs. Ingraham's "yes" conclusions that the file was complete and accurate. Lynch testified at the admissions session in this case that a "Statement as to Attendance and Efforts to Upgrade Compliance" (Exh.8) shows that Mrs. Ingraham had reviewed the entire public Normandy public file and her "yes" entries next to the quarterly issues/programs lists were relied upon by Lynch. (Tr. 424.) Lynch is attempting to show that it

was the fault of his receptionist that there was an erroneous threshold statement introduced in *Skidelsky* and that the situation was now corrected. The secretary in the *Skidelsky* findings was a Mrs. Trombley who had been an employee of Normandy for twenty years. The findings showed that Lynch did not review Mrs. Trombley's results for accuracy. See *Skidelsky ID*, Para. 17 at 2223. There is no showing in Normandy Exh. 8 that Lynch has instituted a better system to review the work of Mrs. Ingraham for accuracy. There is no reference in Normandy's pleadings to a review system that was put in place and implemented after *Skidelsky*. Nor was Mrs. Ingraham called to testify concerning the training she received after the *Skidelsky* findings which would be the kind of evidence that a fact finder would expect to be introduced to show mitigation. Cf. *Skidelsky ID* at 2230 (employees who made program analysis were not produced for examination).

32. Normandy also relies on letters of commendation which are contained in Normandy Exh. 3, Annex A, Annex B and Annex C; Normandy Exh. 9 at Pp. 1-18 and Normandy Exh. 11 at Pp. 1-27. (Tr. 480, 645.) The letters and affidavits in Exh. 3 and in Exh. 9 were not received in their entirety. There were a series of rulings which excluded portions of Exh. 3 because the laudatory matter pertained to WWSC or the evidence was unreliable or was unduly repetitious. (Tr. 300-344.) There was one instance of improper tampering by Lynch with an affidavit of Stephen Borgos. (Normandy Exh. 3 at 11.) Lynch had handwritten "WYLR" in two places even though the Borgos affidavit on its face was testimony only as to WWSC. Lynch admitted writing in "WYLR" without Borgos' knowledge after Borgos had signed the affidavit. (Tr. 290-91.) Lynch also had erroneously inserted the same affidavit of Mayor O'Keefe which had been used in the *Skidelsky* litigation. (Tr. 299-300.) With regard to Exh. 9, the affidavit of Thomas J. Wade was stricken because he was out of the country on the date previously set for his cross-examination, which had been authorized to be taken by speakerphone. The affidavit was dated July 9, 1992 and attests to Lynch's community involvement. The information was more relevant to the renewal expectancy than mitigation. Normandy merely refers generally to the documents in Exh. 3 and Exh. 9 and there is no attempt to put them in focus with respect to mitigation.

33. Exhibit 11 consists of twenty seven documents dating from December 31, 1985, to July 15, 1992. (Normandy Exh. 11, Pp. 1-27 is prefaced by descriptive listing.) There is no evidence that the documents, most of which are letters of commendation from persons in the community, were authored by persons who were aware of the negative findings in *Skidelsky*. Therefore, the evidence has only a marginal value of reliability for mitigation. Nor does Normandy show in its PFC or in its RPFC how any selective documents in Exh. 11 mitigate the disqualification findings in *Skidelsky*. For example, a letter of congratulations from a United States Senator for the receipt by Lynch of an NAB "Crystal Radio Award for Excellence in Local Achievement" does not directly or indirectly establish a nexus of mitigation for Normandy's untruthfulness in a threshold showing, or in a misrepresented site certification, or in failing to identify an undisclosed principal. However, it will be afforded some weight to show a positive reputation of Lynch in the community. Also, evidence in Exh. 11

<sup>5</sup> While the document was properly rejected as evidence in this

case, it continues to be relied upon by Normandy in mitigation.

which is relevant in time will be considered under renewal expectancy and items reflected in Exh. 3 will be considered under mitigation: Lynch's honorable service in Vietnam, Lynch's civic activities in the community (cub scouts, YMCA, Vietnam Veterans of America Chapter 79, Tri-County Taxpayers Association, Tri-County Heart Association, American Heart Association). The Presiding Judge also considers a narrative summary of the civic activities (Exh. 3 at Annex A), certain of the letters and certificate awards (Exh. 3 at Annex B), and the documents attesting to Lynch's honorable military service (Exh. 3 at Annex C). The evidence was reviewed *serialim* on-the-record and not all of the documents were received in evidence. (Tr. 300-350.) But all of the evidence received, even evidence which was principally offered to show civic activities related to Lynch's integration proposal, is taken into account for purposes of mitigation. (Tr. 293-94.)

#### Renewal Expectancy

34. The relevant time period for purposes of determining Normandy's entitlement to a renewal expectancy (the "renewal period") is the period from June 1, 1984, to April 30, 1991. (Tr. 520-21.) Findings with respect to exculpation/mitigation at Paras. 20-33, *supra* are incorporated by reference.

35. For renewal expectancy, Normandy contends that its evidence will show:

- (a) Over the license period, WYLR broadcast news, sports and weather programming on a consistent basis.
- (b) Over the license period, WYLR consistently broadcast PSAs, both live and produced, to answer ascertained problems of its community. (Tr. 661-62, 673-79, 696-97.)
- (c) On an irregular but consistent basis, WYLR broadcast public affairs programming and/or interviews, many times integrally as part of its fundraising or sponsorships of community based events. (Tr. 610-633, 682-694, 710-12.)
- (d) WYLR's nonentertainment programming averaged about 6% of its broadcasting time. (Tr. 567.)
- (e) WYLR can point to numerous concrete examples of the positive effects of its public affairs programming. (Normandy Exhs. 3, 6, 9, 11.)

The record has been reviewed by the Presiding Judge to determine whether Normandy's contentions are supported by substantial evidence. It is found, for reasons detailed below, that WYLR did broadcast news, sports, weather and PSAs on a regular basis. Such broadcasting was substantially the same for WWSC and WYLR. But there is not substantial evidence of substantive nonentertainment WYLR programming that addressed ascertained local issues. And because of Normandy's inept record keeping, the percentage of nonentertainment broadcasting of WYLR cannot be ascertained with a reasonable degree of precision.

#### Renewal Programming

36. During unspecified portions of the renewal period, Lynch has caused Normandy to provide broadcast services for community events. Examples cited by Normandy are

the Adirondack Balloon Festival, professional local ice hockey games, local professional baseball games, and the American Motorcycle Convention. (Normandy Exh. 3, Annex A.) Additional examples are set forth below. However, those services do not constitute specific programming on a regular basis of issues that were ascertained to be of interest to the community.

37. Lynch and Normandy have participated in fundraising for a new YMCA building, and publicized fundraising for the Chapman Historical Museum and the art assembled for the Hyde Collection. Lynch and Normandy have assisted through broadcasting the Lake George Arts Project, the Glens Falls Symphony Orchestra and miscellaneous children's concerts. (Normandy Exh. 3, Annex A.) Normandy also assisted in raising funds to address a local rise in heart related illnesses and deaths, participated in garage sales with an "Operation Santa Claus," and broadcast announcements about the availability of vans to assist unemployed veterans. (*Id.*) Normandy has supported walkathons for cerebral palsy, Girl Scout cookie drives, muscular dystrophy sports tournaments, and church barbecues. (*Id.*) Normandy has sponsored the Lions Drum Corps International Competition which raises money for the sight-impaired. (*Id.*)

38. Although the evidence (Normandy Exh. 3, Annex A) does not make specific reference to dates within the renewal period, there is general reference to the past 10 to 20 years in which the services occurred. Also, testimony of a witness who was Program Director and Operations Manager to WYLR in 1989, corroborates Lynch's representations concerning fund raisers, Walk America, and Easter Seals which were broadcast locally on-the-scene. (Tr. 665-67.)

39. In the course of cross-examination, counsel for Brandt asked questions about PSA programming on WWSC which was not logged for WYLR. Lynch testified that in April and May 1986, newscasts on environmental problems were run on both stations. In August 1986, there was coverage on WYLR of a protest of dairy farmers. (Brandt Exh. 3 at 13-14, Tr. 527.) In November 1986, WYLR carried newscasts about police patrols and a new housing development. (Brandt Exh. 3 at 6; Tr. 527.) In January 1987, both stations carried newscasts about a local dog pound and another housing project. (Brandt Exh. 3 at 11, Tr. 528.) WYLR broadcast newscasts about a building moratorium, chemical control of weeds, flight services and AIDS in April, May, June of 1987. (Brandt Exh. 3 at 13-14; Tr. 528.) Lynch also testified to his belief that all holiday safe-driving programs were aired on WYLR as well as on WWSC. (Tr. 528.)

40. There was no WYLR broadcasting of PSAs and there was never any WYLR nonentertainment programming that was carried over WWSC during the period July 1987 to December 1988. (Brandt Exh. 3 at 15-37; Tr. 528-30.) But Lynch testified that in general, WYLR carries during the work week four newscasts in the morning, one at noon, and three in the afternoon. These daily broadcasts included local as well as national news. (Tr. 539.) Lynch believes that the news programs were of two minute duration. (Brandt Exh. 3 at 42; Tr. 540.) The system utilized by Normandy was to write news copy for both stations and Lynch unequivocally testified that all major news stories were broadcast on both WWSC and WYLR. (Tr. 541-42.) Lynch affirmed that there was much programming on WYLR that was not reflected in the quarterly issues/programs documentation of Normandy. (Tr. 545-46.)

Lynch was examined on the apparent failure to spell out substantive discussions in the written records and Lynch replied:

Simple inadvertence and misunderstanding of the basic rules. We made a mistake, and like I said, we're trying to reconstruct, through testimony and proffers [Exh. 6], what exactly we did over the license renewal period. Be assured, if I had to do this over again, it would be a more complete list.

(Tr. 546.) As an example of Normandy's incomplete methodology, Lynch conceded that records do not accurately reflect the fact of interviews of public officials on WYLR. But Lynch explained that almost all of WYLR's remote broadcasts from the site of an event involved the on-air interviewing of an official. (Tr. 546.) He cited a specific example of a volleyball tournament fundraising event for multiple sclerosis victims, wherein the problem of the disease was discussed and people from the community were asked for possible solutions. (Tr. 546-47.) The problem remained that the documentation which Brandt used to cross-examine did not reflect the full scope of WYLR's public service programming as it was testified to by Lynch.

41. There were miscellaneous additional public interest programs during 1989-90 that were testified to by Lynch: the Lake George Art Project (Tr. 531), the multiple sclerosis bike-a-thon (Tr. 531-32), a 4-H Writers Program and the Prospect School for Crippled Children (Tr. 535), the Lions Club (Tr. 537), Job Discovery (Tr. 553), and the Blood Mobile (Tr. 561). Lynch also identified the local Earth Day program which was aired between January and March, 1990. (Brandt Exh. 3 at 54.) It was broadcast with twelve minutes of comment on ecology in each of three hours. (Tr. 549-50.)

42. Lynch was also cross-examined on WYLR logs for programming on Friday, March 4, 1988 (Brandt Exh. 4) and on Sunday, June 24, 1990. (Brandt Exh. 5.) Brandt Exh. 4 reflected check marks made after programs. (Brandt Exh. 4 at 81.) The evidence shows that a person identified by Lynch as maintaining the logs, Ms. Cynthia Senecal, had made errors. (Tr. 577.) Her supervisor was Mr. Robert Barrett, Program Director of WYLR, and Dave Cobby, the Station Manager in charge of technical matters. (Tr. 577-78.) Ms. Senecal was employed by Normandy from early 1990 to early 1991. (Tr. 579.) Lynch was not checking the logs himself and he did not instruct Ms. Senecal on how they should be maintained. (Tr. 580.) Lynch did not give specific instructions to "line people." That was the responsibility of the AM or FM Program Manager or the Station Manager. (Tr. 581-82.) The emphasis, however, was on checking off commercials as they were aired so that billings could be sent expeditiously. Program announcements were not as meticulously checked, if they were checked at all. (Tr. 582.)

43. In meeting local news coverage, Lynch and Normandy represent that in 1990-91, a program entitled Tri-County Notebook was run live seven days each week announcing community events in time segments of thirty seconds. There were 120 logged programs per week which included announcements about local meetings, fund drives and art exhibits. (Normandy Exh. 6 at 15.) Lynch testified that he personally reviewed the logs in early 1992 (date outside the renewal period) and personally counted the exact amount of public service items. (Tr. 585-86.) But Lynch conceded again that the logs for the period

1990-1991 were inadequate. (Tr. 587.) Lynch contends that he reconstructed the WYLR PSA broadcasting during the renewal period by discussions with station personnel and references to testimonial letters, billings and orders for PSAs. (Tr. 594, 602-03.) The exhibit also contains an internal inconsistency by representing Tri-County Notebook as an entry that was separate from WYLR PSAs which are represented to have been 110 per week. (Normandy Exh. 6 at 15.)

44. Lynch concluded his account by referring to two other witnesses for Normandy who would establish that the bulk of WYLR PSAs in 1990-91 were not reported in the station logs and that corrective actions were taken to assure that current logs are accurate. (Tr. 593.) He admitted again that WYLR had a "major problem" in its paperwork during the license renewal period. (Tr. 596.) Station WYLR (FM) had a different policy on PSAs and actually ran fewer PSAs than Station WWSC(AM). (Tr. 600.) Ms. Trombley wrote PSA issues down for announcers to run on the AM station that were not also run on the FM station. (*Id.*) Many of the PSAs that were broadcast on the FM station were live which provided an opportunity for spontaneous civic announcements or encouragements for people to attend an event. (Tr. 610-11.) But most of the PSAs on the AM station were pre-recorded which could have facilitated a more comprehensive logging system. (Tr. 611.)

45. Lynch sought involvement of the FM station with the community through a less structured spontaneous format. (Tr. 612-13.) For example, according to Lynch, the FM station could muster 600 participants in a walk-a-thon through its live format. (Tr. 613.) Lynch testified that notwithstanding variances in the station logs during the renewal period, the number of PSAs broadcast over the FM station with its live format remained constant. In context, the FM programming offered broadcasting that was community oriented. The Tri-County Notebook was traditionally running 24 hours per day to announce local events. (Tr. 614-15.) A chemical free youth carnival was covered by WYLR in April 1990 from noon to 4:00 p.m. (Tr. 615.)

46. From 1987 to the present, WYLR has broadcast the Prospect School Radio Telethon in conjunction with the AM station in order to raise funds for handicapped children. (Tr. 616.) The Prospect School Telethon (Normandy Exh. 6 at 15) was conducted in the renewal period with four hour live programming through WYLR equipment set up in a satellite location in a shopping mall. The programming was intended to raise funds by personally speaking with persons who were shopping at the mall. These efforts of WYLR were supplemented by about 16 hours of related broadcasting on WWSC. (Tr. 616.) The process is illustrated by Lynch's testimony:

That was 1987. The four hour live remote was 1987, and, since then, we've broadcast with PSAs leading up to the event, and, two, during the day of the event, we will broadcast the numbers that are in there for the phone-ins and will be following up to the total for the time of the telethon.

(Tr. 616-17.)

47. Lynch gave testimony concerning similar WYLR pro-



gramming during the renewal period<sup>6</sup> for the Angela Williams Benefit in 1988 (2 to 4 hours of live broadcasting to raise funds for a child in need of corrective surgery) (Tr. 617); the Chemical Free Youth Council of 1989 (35 minutes each week for four weeks and a four hour live program where children are asked to sign anti-substance pledges) (Tr. 619-20); Bobbin Reports from 1983 to the present (informs for 3 minutes 3 days each week on local offerings of entertainment) (Tr. 620-21); Easter Seals/Volleyball/Softball marathons from 1986 to the present (45 PSAs per week over 2 to 4 weeks to assist local area handicapped population) (Tr. 621-22); Fort Edwards Christmas Decorations in 1989 (depressed economic area assisted by 40 PSAs per week for 2 weeks and a four hour live program) (Tr. 623-24); Queensbury Recycling Committee in early 1990 (20 PSAs week plus live discussions over 4 hours on subject of recycling and instructions for recycling in local areas) (Tr. 625-26); Drug Free Graduation Party in June 1989 (36 PSAs per week and a one day 3 hour live program that illustrated and encouraged substance free youth parties) (Tr. 626); Giant Garage Sale (4 to 6 hours of daily broadcasting for 2 weeks to raise money for journalism scholarships) (Tr. 626-27); Lower Adirondack Regional Arts Council from 1975 to 1990 (2 PSAs for 2 weeks and one four hour live program to support and encourage local artists) (Tr. 627-28); Americaid (12 PSAs per day for 4 weeks and 4 to 8 hours of live coverage to cover a local motorcycle convention and touring event) (Tr. 629-30); Operation Santa Claus from 1987 to 1990 (18 PSAs per week for 5 weeks and 4 to 6 hours of live coverage to provide toys for local needy children) (Tr. 631); Earth Day 1990 (45 PSAs per week plus a 3 hour live program to recognize and appreciate local ecology needs) (Tr. 632-33).

48. The evidence on programming in Normandy Exh. 6 and as testified to by Lynch was corroborated by the affidavits and testimony of two Normandy employees: Thomas J. Jacobsen (Normandy Exh. 9/7 and Tr. 650-698) and Richard C. Dusenbery (Normandy Exh. 9/4 and Tr. 700-713). Both were employed by Normandy since 1986 and worked on the AM and the FM broadcasts. Jacobsen is the current Program Director and Operations Manager. Dusenbery was Program Director during the period 1989-90.

#### Local Testimonials

49. Testimonials that were primarily in the form of letters from local persons were accepted in evidence, subject to a limitation of twenty five that related to the relevant period. (Normandy Exh. 11 at 1-27; Tr. 638-45.) This evidence reflects:

- (a) Letter from Voluntary Action Center dated December 31, 1985, extending gratitude to WYLR for assisting in toy drive. (Exh. 11-1.)
- (b) Letter from March of Dimes dated July 22, 1986, expressing gratitude for assistance with Walk America which raised \$8,000. (Exh. 11-2.)
- (c) Letter from local chapter of the Multiple Sclerosis Society ("MSC") dated September 17, 1986, thanking WYLR for assistance in raising \$14,000. (Exh. 11-3.)

(d) Letter from MSC dated June 4, 1987, requesting WYLR to participate, through broadcasting, in a fundraiser as the "Official Voice" of MSC. (Exh. 11-4/5.)

(e) Unsigned tribute to WWSC from Congressman Gerald B.H. Solomon dated August 7, 1987, noting WWSC's "long tradition of charitable and civic involvement." (Exh. 11-6.)

(f) Letter from MSC dated September 3, 1987, expressing gratitude for broadcasting assistance in raising \$15,845. (Exh. 11-7.) (g) Certificate of appreciation from Easter Seals 1988. (Exh. 11-8.)

(h) Letter from Warren County Veteran's Service Agency dated June 24, 1988, expressing thanks for broadcasting availability of motor van. (Exh. 11-9.)

(i) Letter from West Glens Falls Fire Co. No. 1 dated July 12, 1988, expressing thanks to WWSC for its advertising, sponsorship and financial support. (Exh. 11-10.)

(j) Letter from New York Easter Seal Society, Inc. dated November 15, 1988, thanking WYLR for supporting the disabled community. (Exh. 11-11.)

(k) Letter from New York Easter Seal Society, Inc. dated January 10, 1989, expressing gratitude to WYLR for assisting with a broadcast promotion in a volleyball project that raised \$9,648. (Exh. 11-12.)

(l) Certificate of appreciation to WWSC, WYLR and Christopher P. Lynch from the Lake George Winter Carnival for 1989. (Exh. 11-13.)

(m) Letter from Adirondack Regional Chamber of Commerce dated May 16, 1989, expressing gratitude to Normandy and Lynch for assistance in Job Discovery '89. (Exh. 11-14.)

(n) Letter from Hadley-Luzerne Central School dated January 12, 1989, expressing thanks for assisting senior year students in attending WYLR's Non-Alcoholic Graduation Party. (Exh. 11-15.)

(o) Letter from Lower Adirondack Regional Arts Council dated November 20, 1989, expressing thanks to WYLR and Lynch for promotional broadcasting that assisted in attaining attendance of 4,000 persons at Winter Festival '89. (Exh. 11-16.)

(p) Letter from New York Easter Seal Society, Inc. dated January 29, 1990, expressing gratitude for the assistance of WYLR in raising \$10,843. (Exh. 11-17.)

(q) Letter from American Red Cross Adirondack Chapter dated February 12, 1990, thanking WYLR for assistance in a blood drive. (Exh. 11-18.)

(r) Letter from Chapter Chairman of American Red Cross Adirondack Chapter dated February 12, 1990 expressing thanks to Lynch and WWSC. (Exh. 11-19.)

(s) Letter from Warren/Washington Counties Council on Alcoholism and Substance Abuse ("WWCC") dated April 2, 1990, to WYLR expressing thanks for a live remote broadcast of the Chemical Free Youth Carnival. (Exh. 11-20.)

<sup>6</sup> The programming is described in Normandy Exh. 6 at 16-21. Lynch also testified to the ascertainment of the need for the

programming. (Normandy Exh. 6 at 2-5.)



(t) Letter from the Earth Day Committee of the Community College dated April 24, 1990, expressing gratitude for live coverage of the Prospect Mountain Activity and for broadcast time spent on environment concerns. (Exh. 11-21.)

(u) Letter from March of Dimes dated May 10, 1990, expressing gratitude to WWSC/WYLR for assistance in the 1990 Walk America campaign which resulted in pledges from the Glens Falls community of \$52,686. (Exh. 11-22.)

(v) Letter from WWCC dated May 14, 1990, expressing gratitude to WYLR and Lynch for support in its April activities which attracted 150 persons. (Exh. 11-23.)

(w) Letter from United States Senator Alfonse D'Amato dated August 28, 1990, to Lynch, WWSC/WYLR extending congratulations for the receipt of a broadcasting award from the NAB. (Exh. 11-24.)

(y) Flyer entitled Operation Santa Claus Workshop reflecting "6th Annual Y96 [WYLR] Holiday Hopechest" to benefit area children to be held on October 10, 1991. (Exh. 11-25.)

(z) Affidavit of the Honorable Frances X. O'Keefe, Mayor of Glens Falls, executed on July 14, 1992, stating his knowledge of Lynch for 17 years and Lynch's qualities for honesty and sound judgment and attesting to a social responsibility of Normandy's radio stations. (Exh. 11-26.)

50. The testimonial letters identified above are generally supportive of Normandy's renewal expectancy.<sup>8</sup> However, only slight weight will be afforded to Exhibits 11-6, 11-10 and 11-19, because they relate to WWSC. Also, no weight will be afforded to Exhibit 11-24 which refers only to a broadcasting award as the basis for the testimonial. There will be no renewal testimonial credit awarded when there is no reference in the letter to WYLR's community ascertainment or its meeting some community need in connection with the award.

<sup>7</sup> This exhibit was received in evidence on September 1, 1992, subject to the stipulation that Mayor O'Keefe, if he were to appear, would testify on cross-examination that his knowledge of Lynch and Normandy's community involvement was gained through station WWSC and not station WYLR(FM). (Tr. 698-99.)

<sup>8</sup> Normandy also offered an Exhibit 11-27 which is a letter dated July 15, 1992, a date beyond the renewal period. Therefore, the letter will not be considered because it is irrelevant.

<sup>9</sup> When the HDO was issued in this case, Normandy's appeal on the Skidelsky issues had not yet been fully adjudicated. The Review Board had elected to review only the basic qualification issue on site availability. The Commission has recognized that collateral estoppel is triggered when some question or fact in

## CONCLUSIONS OF LAW

### Mitigation Of Skidelsky Findings

51. Application of the collateral estoppel doctrine requires the adoption here of the findings and conclusions against Normandy in the *Skidelsky* proceeding.<sup>9</sup> *RKO General, Inc.*, 94 F.C.C. 2d 890, 894 n.15 (Comm'n 1983). The judge in *Skidelsky* found Normandy to have misrepresented itself to the Commission in three ways in that proceeding. See Para. 3 above. Therefore, with those findings and conclusions as a given, if the inquiry should end here, Normandy would be disqualified on grounds of character. The Commission has stated a stringent policy for predictive adverse findings based on prior FCC violations:

[W]ith regard to [the] larger class of FCC-related violations we find it appropriate and sufficient to treat any violation of any provision of the Act, or of our Rules or policies, as possibly predictive of future conduct and, thus, as possibly raising concerns over the licensee's future truthfulness and reliability, without further differentiation.

*Character Qualifications In Broadcast Licensee*, 102 F.C.C. 2d 1179, 1209-19 (Comm'n 1986). However, the Commission notes further that "not all violations are equally predictive." *Id.* at n.76. Therefore, the Commission further noted:

[T]he nature of the violation, the circumstances surrounding it, and other pertinent considerations may attenuate or amplify its consideration of future reliability and truthfulness.

*Id.*

52. The ultimate inquiry under the Commission's policy is whether in light of the *Skidelsky* findings, Normandy, under the control of Lynch, can be trusted to be reliable and truthful and to conduct itself in compliance with the Commission's rules in its future dealings with the Commission in the operation of Station WYLR(FM) in Glens Falls, New York. See *Character Qualifications*, *supra* at 1209 (inquiry has historically been whether a licensee found guilty of FCC related misconduct will in the future be likely to be forthright in its dealings with the Commission and to operate its station in compliance with the Act and the rules).

dispute has been finally determined. *RKO General, Inc.*, 82 F.C.C. 2d 291 (Comm'n 1980). As long as Normandy had an appeal pending on the *Skidelsky* issues, the application of collateral estoppel remained in doubt because the *Skidelsky* ID findings were not yet final. However, on April 3, 1992, Normandy petitioned for the dismissal of its Queensbury application. Therefore, with no appeal pending, the *Skidelsky* issues are finally determined against Normandy through collateral estoppel. But accord *Georgia Public Telecommunications Commission, et al.*, 7 F.C.C. Rcd \_\_\_\_\_, Comm'n Slip Op. FCC 92-523, released December 9, 1992 at n.29 (collateral estoppel applies to presiding judge's ID only on issues actually litigated that were essential to the outcome).

53. In drawing conclusions about misrepresentation, the Commission will consider mitigating factors because the Commission has broad discretion in its choice of sanctions. *Id.* at 1210-11. But in cases of misrepresentation, the Commission "is not required to consider the station's past program performance." *Id.* at 1211 n.79. In the final analysis:

[A]n applicant involved in serious misconduct might have its application granted if it could show the ability to operate in the public interest with no likelihood of future misconduct.

*Id.* at 1229. The outcome can only be determined "on the facts of a particular case." *Id.* The Commission has provided the following tests to apply in making predictive judgments based on past misconduct: (a) the willfulness of the conduct, (b) the frequency of such behavior, and (c) the currency *vel non* of the conduct. *Id.* at 1227.

54. The Review Board has acknowledged that "exculpatory" evidence would be relevant to Normandy's qualifications to continue operating WYLR(FM). See Para. 5, *supra*.<sup>10</sup> The Commission believes that a "licensee's record of compliance" provides "direct evidence of an applicant's future behavior" and that "direct evidence of an applicant's behavior outweighs predictive judgments based on extrinsic evidence of an applicant's character." *Character Qualifications, supra* at 1232. Therefore, since past conduct is the appropriate standard, all of the evidence that is in the record of Normandy's conduct, including its efforts to ascertain community needs as well as its failures to document issues/programs, will be considered. Based on the Commission's standard, the acts and omissions of Normandy take precedence over testimonials of character. But even if Normandy's programming were found to qualify for a renewal preference, good programming itself will not be considered as a factor in mitigation of a misrepresentation. See *KQED, Inc.*, 5 F.C.C. Rcd 1784, 1785 (Comm'n 1990), *recon. denied*, 6 F.C.C. Rcd 625 (Comm'n 1990).<sup>11</sup>

55. In support of a conclusion that Normandy had met the Skidelsky issue, the Bureau cites Normandy's evidence on service for a large number of community organizations, Lynch's participation in community activities, Lynch's honorable military service, and efforts to ensure and improve compliance with Commission rules and practices. The Bureau argues in proposed conclusions that the mitigating evidence is sufficient to meet the Skidelsky issue because that misconduct was an isolated incident, there is no indication of a misrepresentation in this proceeding, and there is no expectation that Normandy will later misrepresent itself to the Commission. The Bureau cites the Commission's holding that:

Our principal concern is with misconduct disclosing a pervasive unwillingness or inability to meet the basic responsibilities of a licensee - - -. We have considered misconduct of a more limited nature a factor in not absolutely disqualifying - - - licensees.

<sup>10</sup> The Review Board recognizes that the specific issue in this case is different from *Skidelsky*. After considering "the vicissitudes of Normandy's conduct in a forum where the issue truly has a decisional dimension," the Board asks for analysis of the "complex legal and policy issues inherent in that consequent issue." 7 F.C.C. Rcd at 1393.

<sup>11</sup> The Commission's policy is stated in the *Character Quali-*

*WIOO, Inc.*, 95 F.C.C. 2d 974, 983 (Comm'n 1983).

56. Brandt reviews the findings and conclusions in the *Skidelsky I.D.* Brandt argues that Normandy has failed to meet its burden of proof and has limited its proof to broadcast program service which Brandt characterizes as "minimal." Brandt relies on the Commission's policy against misrepresentation, the requirement for candor in dealing with the Commission, and the ability to be truthful in future dealings with the Commission.

57. It is noted in mitigation that Lynch took Normandy into the *Skidelsky* comparative proceeding as a licensee that had no history of Commission violations. Normandy has now totally withdrawn itself from the appeal process of that case and will no longer be a possible licensee in Queensbury and Normandy has lost the right to compete for a new license. But Normandy chose to compete in Queensbury and must now live with the record it made in that proceeding. Normandy may also one day file for another frequency and therefore the motivation for Normandy to mislead the Commission could reoccur. Normandy also has expended considerable sums of money and amounts of time in responding to the adverse character findings against Normandy in this renewal proceeding. But those adverse economic factors are a result of Lynch's misconduct and do not mitigate the adverse character findings.

58. Lynch admits that he made mistakes in accumulating and assessing data about Normandy's programming. (See Para. 40, *supra*.) Because of a failure on the part of Lynch to establish a comprehensive regimen for recording WYLR's nonentertainment programming, Lynch rendered Normandy's credibility vulnerable to cross-examination. Lynch, Jacobsen and Dusenbery attempted to fill the lapses in Normandy's business records through their written and oral testimony. That was necessary testimony in order to complete the hearing record because the Commission's rules do not require logs to be maintained with respect to station programming. See 47 C.F.R. §73.1800 *et seq.* But Normandy was required to and did at times sporadically maintain an imperfect version of the required issues/programs lists as required by the Commission rules. See 47 C.F.R. §73.3526(9). In the totality of the documentary evidence, there were insufficient Normandy records to establish whether Lynch and the other two witnesses had an accurate recollection of WYLR's programming. Without an affirmative showing of a positive effort to correct an inadequate record system that was a significant factor in the adverse findings of *Skidelsky* with respect to Normandy's representations of its programming, there is no mitigating characteristic to the testimonial accounts of programming which were shown, under cross examination, to be based more on generalities and to be not accurate in all material respects. See Paras. 27, 31, *supra*.

59. The Bureau further argues in support of mitigation that there has been no evidence or "hint" in this proceeding of misrepresentation, lack of candor or any other misconduct. See Bureau's PFC at 10. But the fact is established by Lynch's own admission that he had altered the Borgos

*fications* proceeding that was held to set policy. There the Commission adopted a standard of discretion as not being required to consider a station's past program preference. *Character Qualifications*, 102 F.C.C. 2d at 1211 n.79. The *KQED* decision tightens the policy by excluding programming where there is "serious deliberate misconduct such as misrepresentation." *KQED, Inc.*, 5 F.C.C. Rcd at 1785.

affidavit (Exh. 3 at 11) to reflect WYLR when the affiant intended to reflect only WWSC. (See Para. 32, *supra*.) Also, there is no reference by the Bureau to the two additional misrepresentations found in *Skidelsky* with respect to the availability of an antenna site and the failure to disclose a contingent principle. *Skidelsky* at 2228, 2230. Lynch was found to have failed to produce witnesses who would have corroborated Lynch's testimony concerning conversations with a site owner. Such third-party testimony was found to be necessary because the site owner had denied in a declaration ever speaking with Lynch. Yet Lynch based his defense on his recollection of such a conversation with the owner. Lynch also failed to produce a witness from a real estate firm with whom he claimed to have had conversations about the site. A similar failure on the part of Lynch to produce relevant witness testimony has occurred in this case. The testimony of Mrs. Jackie Ingraham would have shown the system that Lynch contends was implemented at WYLR to accurately record programming data. See Para. 31, *supra*. There has been no evidence introduced by Normandy in this case which counters the conclusion in *Skidelsky* that there is a substantial likelihood that Normandy will not make a trustworthy licensee. While Normandy is not required to log its programming, Normandy is required to maintain true and accurate issues/programs lists. In light of the misrepresentations of programming found in *Skidelsky*, evidence of mitigation that would show that Lynch has installed a system of maintaining true and accurate records and that would demonstrate a recognition on Lynch's part of the need for candor in representing programming claims to the Commission would be the most weighty mitigation. Normandy has failed to present such mitigation evidence.

60. It was further found in *Skidelsky* that Lynch has a secured arrangement for a ten year loan that involves the pledge and escrow of all Normandy stock. The terms of the loan provide that the creditor would receive all of Normandy's stock if Lynch fails to pay the debt. An order issued by the judge in *Skidelsky* required disclosure of such an arrangement. Yet Lynch failed to produce the loan agreement. The judge found that Lynch's failure to report the contingent ownership would not alone disqualify Normandy from receiving a grant in that proceeding. Rather, it was the representation made in that proceeding by Lynch that he mistakenly believed that he did not need to disclose the contingent ownership because he did not believe that the contingency ever would occur which was the wrongdoing. There is no evidence of a similar misrepresentation in this case. But there is a parallel incident in this case of Lynch attempting to submit the altered Borgos affidavit which shows a continuing disposition on the part of Lynch

to alter the truth. Also, the mere absence of a wrongful act of misrepresentation in this case would not be a proper standard of mitigation because it would reward a previously errant licensee simply for later adhering to the law as one is required to do anyway.

61. Normandy has introduced evidence which establishes that in February 1990, a date prior to the release of the adverse *Skidelsky* findings, Lynch had attended a NAB sponsored course on the Commission's renewal process. (Para. 31, *supra*; Normandy, Exh. 8.) Thus, Normandy cannot contend that Lynch attended the conference to correct the rulings disclosed in *Skidelsky*. The evidence further reflects a representation by Normandy that Lynch gave to his receptionist, Mrs. Jackie Ingraham, a page from the NAB primer regarding public files and Lynch requested her "to check all items and her yes notations signifying in her judgment all files are correct." (Normandy Exh. 8.) But Mrs. Ingraham was never produced as a witness to explain the system. It cannot be determined that based upon Lynch's attendance at the NAB conference Normandy's public file record keeping is maintained in a manner that would show that Normandy's misrepresentations in *Skidelsky* would not be repeated.<sup>12</sup>

62. Normandy and the Bureau also rely on efforts made by Lynch to determine community needs as relevant evidence for mitigation. Employees of Normandy interviewed community leaders and representatives of fifty local organizations. (Normandy Exh. 6 at 2-3.) For purposes of news coverage, Normandy contacted twenty nine identified local agencies. (*Id.* at 5-6.) Such evidence relates to the ascertainment of programming needs and it has been established as the rule of this case that evidence of programming is not accepted in mitigation of misrepresentation. *KQED, Inc., supra*.<sup>13</sup> However, the ascertainment evidence does demonstrate that Normandy was seeking to cooperate with local groups to get out their PSAs and such evidence does mitigate, to a degree, the adverse findings in *Skidelsky*. But it does not meet the adverse inference of future conduct raised by the *Skidelsky* findings.

63. Lynch served honorably in the armed forces for three years and he received an honorable discharge before he began his broadcasting career at Normandy. His military service shows an ability to accept responsibility. Normandy also introduced evidence showing that Lynch has a good reputation in the community for completing commitments made on behalf of WYLR for fund raising broadcasting. (See Normandy Exh. 11.) Such evidence in its totality does not support a conclusion that Lynch's conduct in the *Skidelsky* comparative proceeding might not be repeated. The Bureau argues in its PFC that it was a series of

<sup>12</sup> It is noted that a handout at the NAB conference did address the public inspection file and the quarterly issues/programs lists in that file. (Normandy Exh. 8.) Yet there is no conclusion reached that Lynch has succeeded in installing a record system that might be considered representative of industry standards. Lynch seems satisfied to delegate general instructions to subordinates without himself personally monitoring compliance. Lynch is the owner of Normandy who must assess the company's priorities. But there was considerable time spent in discovery and in cross-examination that could have been considerably shortened by having in place a high caliber record keeping procedure.

<sup>13</sup> As noted above, the Commission's policy was initially stated as not requiring consideration of the station's past program performance where there has been a misrepresentation. *Char-*

*acter Qualifications* at 1211 n.79. That standard would permit consideration of programming as a matter of discretion. But in a subsequent adjudication, the Commission eliminated the discretionary direction about programming evidence and held that such evidence of meritorious programming must be excluded to mitigate a misrepresentation. *KQED, Inc., supra* at 1785. See *Homemakers North Shore, Inc., v. Bowen*, 832 F.2d 408, 412-13 (7th Cir. 1987) (a change in interpretation may be announced in an administrative adjudication). Since meritorious programming is derived through ascertainment, the evidence of ascertainment of programming needs is also irrelevant to mitigate a misrepresentation. However, Normandy's efforts to ascertain community need will be considered a factor in mitigation without reference to the substantive merits of the ascertainment.

"exaggerated claims" that formed the basis of the judge's conclusions in the *Skidelsky ID*. That conclusion would be contrary to the principle of collateral estoppel as applied in the *Skidelsky Recon*. That conclusion also is not supported by the facts and conclusions. See *Skidelsky ID* at 2229-30, 2232 (Normandy has not established that it can be relied on to provide truthful information to the Commission). The judge in *Skidelsky* found three counts of misrepresentation on the part of Normandy and those findings will not be qualified here. General opinion evidence will not offset findings and conclusions regarding three distinct misrepresentations.

64. The Bureau and Normandy also rely on the case of *United Broadcasting Co.*, 49 Radio Reg. 2d (P & F) 5897, 602 (Comm'n 1981) which held that the loss of one license does not preclude the grant of another license. But here it is not the fact of denying Normandy's application in *Skidelsky* that warrants a denial of renewal in Glens Falls. Rather, the findings and conclusions in *Skidelsky* establish misrepresentations which under principles of collateral estoppel as applied by the Review Board to this case cannot be litigated here. The failure of the burden of proof on the part of Normandy to mitigate those misrepresentations is the proximate cause for a denial of renewal here. Thus, the denial of a construction permit for a new FM facility in *Skidelsky* is irrelevant to whether or not Normandy has shown through mitigation evidence that it will be trustworthy in its dealings with the Commission.

#### Renewal Expectancy

65. The Commission has recently prescribed a narrow standard for the application of collateral estoppel to initial decisions of administrative law judges. See *Georgia Public Telecommunications Commission*, *supra*, Slip Op. FCC 92-523 at n.29 (collateral estoppel applies only to litigated issues that were essential to outcome). Since Normandy was disqualified by the Review Board solely for lack of reasonable assurance of an antenna site, the litigation of the three misrepresentations may not have been necessary for the *Skidelsky* outcome. However, that is a separate question of law for the Review Board to address on appeal. For purpose of adjudication at the hearing level, the application of collateral estoppel as prescribed for this case by the Review Board in the *Skidelsky Recon*. continues to be the law of this case. However, the Presiding Judge will adjudicate the comparative phase of this case in the event the above conclusion with respect to Normandy's license disqualification is reversed on the merits, or for failure to meet the Commission's recently stated policy on collateral estoppel.

66. In addition to the standard comparative criteria,<sup>14</sup> a renewal expectancy may be awarded to an incumbent licensee if it is warranted following a review of the incumbent's past program performance during the renewal period. It has been held:

[Commission] policy, as we understand it, is simply this: renewal expectancy is to be a factor weighed with all the other factors, and the better the past record, the greater the renewal expectancy "weight."

*Central Florida Enterprises v. F.C.C.*, 683 F.2d 503, 506 (D.C. Cir. 1982). A renewal expectancy is warranted if the incumbent is shown to have met the needs and interests of the listeners in the community of license or service area. Where an incumbent shows past broadcasting that pays unusually high attention to community needs and interests, the past record will be considered "superior" which adds a greater weight to the renewal expectancy. *Formulation of Policies and Rules to Broadcast Renewal Applicant ("Renewal Policy II")*, 3 F.C.C. Rcd 5179, 5185 (Comm'n 1988).<sup>15</sup> When an incumbent renders "substantial" but not superior service the expectancy becomes a comparative preference weighed against the other comparative factors. *Cowles Broadcasting II*, 86 F.C.C. 2d 993, 1012 (Comm'n 1981). But if the level of performance is found to be "minimal," there is no comparative credit for past broadcasting afforded to the incumbent. *Renewal Policy II*, *supra* at 5185.

67. Normandy represents that it conducts periodic community ascertainment by interviewing community leaders and members of the general public. Normandy's claim for renewal expectancy relies on news, sports, weather and PSAs. WYLR's predominantly music format permitted such broadcasting to be conducted only through short announcements and spot broadcasts. WYLR(FM) was a music intensive radio station that was not presenting discussion format public affairs programming.

68. Claims for credit for specific programming claimed by Normandy are difficult to assess because of apparent exaggerated claims for the Tri-County Notebook, because of questions raised by the dearth of useable information in Normandy's records, and because the announcers were instructed to be precise in checking off only the commercial advertisements. There was no documentation of nonentertainment programming in 1984-1985, and programming thereafter was in large part estimated by Lynch and Normandy employees through undocumented seat-of-the-pants backward projections from 1992 records. (See Paras. 43-44, *supra*.)

69. There was testimony from Lynch and two Normandy employees, Messrs. Dusenbery and Jacobsen, on the substance of Normandy's non-entertainment programming. But much of the testimony was general, unfocused and inconsistent with a finding of substantial programming:

Because of WYLR's format and listenership, most public service and community affairs issues were covered through short announcements and live broadcasts. This was deemed the most effective way to get the message to our listeners.

<sup>14</sup> See *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (Comm'n 1965). But the Commission gives only a secondary status in comparative renewal proceedings to the structural factors of diversity and integration. See *Cowles Broadcasting, Inc.*, 86 F.C.C. 2d 993, 1015 (Comm'n 1981).

<sup>15</sup> Beginning in 1982, the Commission has been conducting a

comprehensive inquiry into proposals for comparative renewal hearings. See *First Report and Order*, FCC 89-108 (released May 16, 1989) ("Renewal Policy I"); *Renewal Policy II*, *supra*; and *Third Further Notice of Inquiry and Notice of Proposed Rule Making*, 4 F.C.C. Rcd 6363 (Comm'n 1989) ("Renewal Policy III").

(Affidavit of Dusenbery, Normandy Exh. 9 at 4-5.) In other words, a deliberate policy choice was made to not present a regular program on community needs such as regular scheduled interviews and discussions on local issues with local civic leaders, police and fire chiefs, etc. On cross-examination, Dusenbery testified:

A. WYLR's format - - - [was] serviced through short wide reads, as opposed to 60 second pre-recorded announcements, so we could adlib our way through it.

Q. But you don't do any regular scheduled public affairs programs<sup>16</sup> on WYLR. Is that correct?

A. WYLR was, at the time, was a music intensive radio station, so, no, we would not - - - we would not format a talk public affairs program.

(Tr. 704-05.) Dusenbery further testified:

Q. [D]id you hear any public affairs on WYLR during your tenure as Program Director?

A. I did not hear public affairs programs, - - -.

(Tr. 710.) Lynch then questioned Dusenbery on redirect:

Q. Can you give me examples of the public affairs you just referred to, the type of public affairs that you heard over your radio station under your tenure over the period of 1989-1990

A. We - - the public affairs that we broadcasted and covered were campaigns. I would not classify them as public affairs programs. We had specific campaigns for a number of different issues.

(Tr. 711.) Lynch had also admitted in the *Skidelsky* hearing that the public service announcements aired by WYLR were "minimal." (Brandt's PFC at 10.)<sup>17</sup>

70. The judge in *Skidelsky* concluded that it was doubtful that Normandy carried any public affairs programming on WYLR. *Skidelsky ID* at 2232 n.3. In *Skidelsky*, Lynch explained, as he has in this case, that FM noncommercial programming was not kept track of by logging as was done at the AM station. *Id.* And in this case, Dusenbery admitted that WYLR's format was geared toward a younger group, a format which is consistent with Normandy's format in *Skidelsky* where it was found that the younger FM audience was not as receptive to nonentertainment programming as was the AM audience. This evidence further supports the conclusion that WYLR has never presented a *bona fide* nonentertainment programming format that could qualify for a substantial renewal preference.

71. Review of a licensee's record must also take account of compliance with Commission rules. See *Metroplex Communications, Inc.*, 4 F.C.C. Rcd 8149, 8153 (Review Bd 1989), *aff'd* 5 F.C.C. Rcd 5610 (Comm'n 1990). While

program logs are no longer required, the Commission's rules with respect to public inspection files do require the creation and maintenance of quarterly data on nonentertainment programming. The rule specifically provides:

For commercial AM and FM broadcast stations, every three months a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period [shall be maintained for public inspection].

\* \* \*

The list shall include a brief narrative describing what issues were given sufficient treatment and the programming that provided this treatment. The description of the programs shall include, but is not limited to, the time, date, duration and title of each program in which the issue was treated.

See 47 C.F.R. §73.3526(9) (local public inspection files of commercial AM and FM stations). These lists are referred to as "issues/programs lists." Normandy has failed to comply with the rule.

72. Station WYLR(FM) was in non-compliance with the rule throughout much of the renewal period. (See Paras. 25 to 44, *supra*.) The arrogance of non-compliance is most graphically illustrated by the total absence of reporting in 1984 and 1985 when there were absolutely no FM programs listed on WYLR's issues/programs lists. (Brandt Exh. 3.) The lists for 1986 and 1987 also contain no programming for the FM station. Lynch testified that there were newscasts listed for the AM station that were also broadcast over the FM station. (Tr. 527-28.) The hearing was protracted by cross-examination as a result of Normandy's failure to maintain the lists. Brandt was allowed to cross-examine Lynch fairly extensively because there were no records available through discovery to establish with any precision the nonentertainment programming of WYLR during the renewal period.

73. Based on the experience the Commission has had with Normandy's issues/programs lists both in *Skidelsky* and in this case, it is likely that Normandy and Lynch will continue to be less than candid with the Commission with respect to Station WYLR(FM) in the future. That conclusion is reached as a result of the repeated instances in both cases where Normandy could not produce the required records and, more importantly, the failure on the part of Normandy to produce a witness to testify that a system was put in place before or shortly after the release of the *Skidelsky ID* which would assure compliance by WYLR with the Commission's rule requiring the maintenance of issues/programs lists. There is absolutely no assurance in the record that Normandy and Lynch have adequately

<sup>16</sup> A definition of public affairs programming acceptable to the witness was stated by Brandt's counsel as follows: "A public affairs program is a specific, program allotted a specific time or number of minutes in a week or a month or whatever, devoted specifically to one issue or a public affairs forum." (Tr. 704).

<sup>17</sup> In his PFC, Brandt quotes Lynch and cites to the *Skidelsky*

transcript. Lynch did not deny or qualify the quote in Normandy's reply pleading which was subsequently filed. Therefore, Brandt's unchallenged representation of the *Skidelsky* transcript is accepted as well as the admission against interest by Lynch.

trained and instructed an employee who will meet WYLR's public file reporting duties with regard to nonentertainment programming.

#### Normandy's Failures Defeat A Proposed Policy

74. The importance of maintaining complete and current issues/programs lists is illustrated by a policy proposed by the Commission that an "incumbent be granted a *rebuttable* presumption that it has provided meritorious service sufficient to warrant a renewal expectancy credit upon presenting [issues/programs lists] at the comparative hearing." *Renewal Policy II, supra*, 4 F.C.C. Rcd at 6365. The Commission proposes presumptive evidence because the Commission recognizes the reliability of such mandated lists:

The "issues/programs" list is a significant and representative indication that a licensee is providing substantial service to meet the needs and interests of its community, and thus may be entitled to a renewal expectancy.

*Id.* The Commission has been studying ways to improve the comparative renewal process. Under the *Renewal Policy II* approach, in the aspect of evidentiary proof, the Commission expects to expedite the hearing by a presumption of a renewal preference based on the lists with which Commission broadcast licensees must comply. By wilfully failing to establish reliable issues/programs lists, Normandy, Lynch and WYLR would not be able to comply with the policy. Granting Normandy a renewal expectancy for "substantial" programming when Normandy had failed to maintain the underlying documents could set a deleterious example for the rest of the industry. The need for deterrence, acknowledged by the Bureau, must go beyond the incumbent licensee to the industry as well. *See WIOO, supra*, 95 F.C.C. 2d at 984 (lost opportunity due to violation was significant deterrent to repetition by incumbent "and others").<sup>18</sup>

#### Normandy's Failure To Prove A Substantial Format

75. Normandy missed its opportunity for more than a "minimal" presumption from its issues/programs lists for Station WYLR(FM). In fact, WYLR's license is in jeopardy because of Normandy's failure to compile the lists. For his part, Brandt has shown that WYLR did not broadcast nonentertainment programs (as distinguished from news-

casts and PSAs), that the lists do not reflect that issues important to the community were sought out, developed and responded to in program broadcasting formats, and that for two or more years there was a failure to compile required lists for WYLR. Therefore, the Commission's policy as presently formulated requires the conclusion that Normandy has failed to meet its burden of proof with respect to a renewal expectancy. *Cf. WWOR-TV, Inc.*, 5 F.C.C. Rcd 2845, 2846 (Comm'n 1990) (Comm'n 1990) (Comm'n expects decision-making personnel to be aware of changing Commission policy and, where appropriate, to apply such change in pending cases).<sup>19</sup>

76. Evidence that the Bureau urges as sufficient to warrant a substantial renewal expectancy also is weighed and considered by the Presiding Judge under the established standards for renewal expectancy. The Commission has defined "substantial" as programming that is "sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal." *Cowles Broadcasting I*, 62 F.C.C. 2d 953, 955 (Comm'n 1977). The Bureau has marshalled evidence which does not meet that definition of "substantial" because the format of WYLR remains essentially music directed towards young persons. That constriction of the programming limits considerably the universe of the ascertained community needs of WYLR's audience. And the format admittedly excludes nonentertainment programming that is "substantially above" newscasting, weather forecasting, fund raisers and PSAs.

77. The Bureau represents that over the license term, WYLR broadcasts on a weekly basis about 55 local newscasts of 3 minutes duration and about 70 national newscasts of between 1 to 2 minutes. Between 6 and 7 newscasts would be made during morning and evening drive times. WYLR also broadcast 20 weather forecasts of about 30 seconds duration each week. Also, on a weekly basis, WYLR ran approximately 100 PSAs of about 30 seconds duration, about half of which were for local organizations. (Normandy Exh. 6 at 6-8, 14-15.) And in the course of presenting such public service broadcasting, WYLR ran from time to time certain remote live programming designed to raise funds for local chapters of recognized charitable organizations such as Multiple Sclerosis, Easter Seals, March of Dimes, Lions. (*See Paras. 36-37, supra.*) The community interests for such broadcasting were determined by Normandy staffers who spoke with approximately 80 organizations and individuals. (*Paras. 20, 62, supra.*) The percentage of WYLR's broadcast time that was devoted to this non-entertainment broadcasting cannot be deter-

<sup>18</sup> *Renewal Policy II* also proposes that once the presumption is triggered, the opposing applicant may present evidence in rebuttal. Specifically, the policy states:

For example, a presumption based on compliance with the issues/programs list requirement, as proposed above, could be rebutted by demonstrating that: (1) the licensee did not broadcast programs listed on its issues/programs list; or (2) the programs listed were not responsive to issues of concern to the licensee's audience and the licensee's judgments in this regard were not reasonably made.

*Renewal Policy II, supra* at 6365. Evidence offered by Brandt's Exhs. 3, 4 and 5 would rebut any presumption of "substantial" programming if Normandy was found to merit a presumption.

<sup>19</sup> The prospective policy proposed by the Commission under *Renewal Policy II* is applied here for two reasons: First, to show that Normandy's persistent failure to compile adequate issues/programs lists would frustrate the proposed policy and would set the wrong example for the industry in light of a prospective adoption of such a policy. Second, to illustrate how even under a proposed policy change that is intended to simplify proof of renewal programming for the benefit of incumbent licensees, Normandy would not benefit from the proposed presumption in its favor and would frustrate the regulatory efficiency that is intended to be gained. Since renewal is decided on prospective evidence, it is appropriate here to make the analysis.

mined with any reasonable precision, and therefore it cannot be found to be "substantial" under the *Cowles I* definition. Cf. *Simon Geller*, 90 F.C.C. 2d 250 (Comm'n 1982), *recon. denied*, 91 F.C.C. 2d 1253 (Comm'n 1982) (no renewal expectancy awarded where less than 1% of incumbent's broadcasting was nonentertainment). While it cannot be determined based on the data submitted by Normandy whether the above broadcasting accounts for less than 1% of the universe of WYLR broadcasting for a measured period of time, nor can the calculation of 6% advanced by Normandy be ascertained from the hearing record. (Para. 35, *supra*.) Thus, as an additional ground for denying Normandy a substantial renewal preference, the evidence relied on by Normandy is not sufficiently reliable to support any such finding. See APA Section 7(c) which requires a record supported by "reliable, probative and substantial" evidence. [5 U.S.C. Section 556(d)].

78. The conclusion is reached that Normandy has not met its burden of proof even after considering the testimonial letters compiled by WYLR in Normandy Exh. 11 and the testimonials also received in evidence as part of Normandy Exh. 9 and part of Normandy Exh. 3. The Commission has held that there are three elements in determining the weight to be accorded to any renewal expectancy: (a) the amount of nonentertainment programming presented, the time of day it is presented and whether it is directed to local needs and interests; (b) the amount of locally produced programming; and (c) the reputation of the station in the community. *Radio Station WABZ, Inc.*, 90 F.C.C. 2d 818, 840-42 (Comm'n 1982), *aff'd sub nom. Victor Broadcasting v. F.C.C.*, 722 F.2d 756 (D.C. Cir. 1983). As concluded above, Normandy has failed to introduce reliable and substantial evidence of WYLR(FM) programming that was not related to WWSC(AM) programming and which met an identified community programming need or interest. The bulk of the evidence presented by Normandy that related specifically to WYLR was in the form of narrative testimonial accounts and which focused primarily on newscasts, weather reports, weather warnings, and fund raisers or narrow onetime community events such as anti-substance abuse projects. For example, there was no evidence of nonentertainment talk programming such as that illustrated in another case as follows:

The station [WABZ-FM] set aside 12:30 p.m. each day, for public affairs programs. At that time, the station presented an interview, often live, with a local official. [Footnote omitted.] These five minute segments dealt with issues of particular concern to the community. [Footnote omitted.]

*Radio Station WABZ, Inc.*, 90 F.C.C. 2d at 840. Rather, in stark contrast to that example of "substantial" programming, WYLR's format was described as music intensive directed to a young audience and which purposefully did not include "talk public affairs programs." (Tr. 705.)

79. The testimonials from members of the community are important and have been fully considered by the Presiding Judge. (See Paras. 49-50, *supra*.) But the Review Board has noted that while public witnesses can enhance

an otherwise creditable programming record, it cannot serve as a basis for a renewal expectancy in the absence of a programming record. *Metroplex Communications, Inc.*, 4 F.C.C. Rcd at 8153. Therefore, the testimonials are not sufficient evidence to award Normandy a renewal expectancy.

### Comparative Analysis

80. Because Normandy has failed to prove meritorious nonentertainment programming that qualifies for a superior or a substantial renewal expectancy preference, only a minimal renewal preference is awarded. The legal implications of that conclusion are as follows:

Where - - - the incumbent rendered substantial but not superior service, the "expectancy" takes the form of a comparative preference weighed against [the] other factors - - -. An incumbent performing in a superior manner would receive an even stronger preference. An incumbent rendering minimal service would receive no credit.

*Central Florida Enterprises II*, 683 F.2d at 506, citing with approval *Cowles II*, 86 F.C.C. 2d at 1012. Thus, Normandy and Brandt are now to be compared as equals under the comparative criteria.

81. Normandy receives 100% credit for integration and a substantial qualitative credit for Lynch's long-term residency in the service area. There was evidence offered of Lynch's significant civic activities and therefore a significant qualitative credit will be awarded for his local residency. See *Ronald Sorensen*, 6 F.C.C. Rcd 1952 (Comm'n 1991) (local residence must be considered in conjunction with civic activities). Normandy will also receive a slight qualitative credit for Lynch's broadcasting experience. *Policy Statement*, 1 F.C.C. 2d at 396 (previous broadcast experience is of "minor significance"). Since Brandt does not intend to integrate himself into management he receives no integration credit. Nor would he receive a credit for qualitative factors since he does not intend to integrate into management. Both Normandy and Brandt propose to install auxiliary power systems and therefore both are evenly assessed under that criteria.

82. Normandy owns WWSC(AM) in addition to WYLR(FM) and both stations are broadcasting in the same community of license. Normandy has made no commitment to divest WWSC if it is awarded a renewal of WYLR and Lynch intends to continue to operate both stations. (Tr. 237.) Brandt has five MMDS systems in areas that are outside of the Glens Falls service area. Three of those systems are out of state.

83. Normandy will receive a substantial demerit under the diversification criteria which the Commission considers a factor of primary significance as a comparative criteria. See comparative *Policy Statement*, 1 F.C.C.2d at 394 and *Renewal Policy II*, 3 F.C.C. Rcd at 5188. Brandt's five MMDS properties will have no impact on Brandt's comparative diversification position. *Id.*<sup>20</sup>

<sup>20</sup> See generally *Morris, Pierce & Pierce*, 88 F.C.C. 2d 713, 724 (Review Bd 1981) (no diversification demerit assessed where program production interests are not significant in the subject locale), *review denied*, FCC 83-31, released January 25, 1983. See

also *Mark L. Wodlinger*, 3 F.C.C. Rcd 3139, 3142 (Review Bd 1988) (no significant diversification demerit for LPTV services outside the service area).



84. The ultimate question for determination is the weight to be accorded a diversification demerit against Normandy as an incumbent in a comparative renewal case. While diversification has been an outcome-determinative criteria in comparative hearings for new facilities, where the incumbent proves that it performed well during the renewal period the Commission's policy has been to ascribe a secondary importance to diversification in comparative renewal proceedings. *Renewal Policy II*, 3 F.C.C. Rcd at 5188-89. See also *F.C.C. v. NCCB*, 436 U.S. 775, 803-09 (1978) (where challenger has greater diversification the incumbent with a meritorious record will prevail) and *Cowles II*, 86 F.C.C. 2d at 1015, *aff'd*, *Central Florida Enterprises II*, 683 F.2d at 506-07. But the policy considerations for ascribing a lesser importance to diversification in renewal cases<sup>21</sup> evaporates where the incumbent fails to show a substantial superior performance in the renewal period. *Id.* Cf. *Simon Geller II*, 59 Radio Reg. 2d (P&F) 979 (Comm'n 1985) (incumbent which had lost renewal preference ultimately succeeded against challenger under comparative criteria of diversification and integration).

85. Because Normandy has failed to prove entitlement to a renewal expectancy preference, an analysis under the standard comparative criteria requires an award to Brandt because of Normandy's substantial diversification demerit.<sup>22</sup> It is noted that under prevailing case law the Commission will weigh all at once a prior violation (e.g. studio move) along with evidence relating to renewal expectancy and the comparative criteria. See *Central Florida II*, 683 F.2d at 506-07 n.16, *affirming Cowles II*, 86 F.C.C. 2d at 1015-18. Later, the Commission abandoned character violations as a comparative criteria and applied the policy against the comparative use of character to comparative renewal proceedings as well. *Character Qualifications*, 102 F.C.C. 2d at 1229-32. In this *Initial Decision*, the Presiding Judge has concluded separately (1) that Normandy has failed to exculpate or mitigate the three adverse character findings in the *Skidelsky ID*; (2) that even if that conclusion regarding *Skidelsky* is not approved on appeal, Normandy is not entitled to a renewal expectancy based solely on the evidence of its nonentertainment broadcast record and without consideration of the adverse *Skidelsky* findings;<sup>23</sup> and (3) the award to Brandt under the comparative criteria does not include any demerit against Normandy for the adverse findings of *Skidelsky*.

### Summary Conclusions

86. Normandy is found to be unqualified as a Commission licensee and not entitled to a license renewal for Station WYLR(FM), Glens Falls, New York, because Normandy has failed to prove exculpation or mitigation from adverse character violations found against it in *Barry Skidelsky*, 6 F.C.C. Rcd 2221 (Admin. L.J. 1991) and that therefore Normandy is disqualified to own and/or operate WYLR(FM)<sup>24</sup> because Normandy has not established that it can be relied upon to hereafter provide truthful and candid information to the Commission.

87. Alternatively, Normandy has failed to prove that it is entitled to a renewal expectancy preference because the evidence offered by Normandy fails to show that the incumbent complied with the Commission's rule requiring quarterly programming lists and in conjunction with that violation of a Commission rule there was insufficient reliable evidence to establish superior or substantial nonentertainment programming for Station WYLR (FM) during the renewal period June 1, 1984 to April 30, 1991. Specifically, the evidence of record shows that WYLR(FM) offered a predominantly music format for a younger audience which did not include any substantive programming to cover local issues. Nonentertainment programming was limited to newscasts, weathercasts, announcements and spot fund raisers for local charitable organizations which is evidence found in its entirety to constitute minimal nonentertainment broadcasting. When compared with Brandt, Normandy, without benefit of a renewal preference, loses because of its substantial diversification demerit.

### ORDER

Accordingly, IT IS ORDERED that the license renewal application of Normandy Broadcasting Corp. (File No. BRH-910129UR) for Station WYLR(FM) (95.9 MHz), Glens Falls, New York, IS DENIED.

IT IS FURTHER ORDERED that the application of Lawrence N. Brandt (File No. BPH-910430MB) for a Construction Permit for a new FM Station on 95.9 MHz at Glens Falls, New York, IS GRANTED.<sup>25</sup>

### FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel  
Administrative Law Judge

<sup>21</sup> The Commission holds that a challenger can unfairly structure its application to take advantage of an incumbent's diversification weakness and that an unqualified application of the diversification criteria to incumbents might lead to a haphazard restructuring of the broadcast industry. *Renewal Policy II*, 3 F.C.C. Rcd at 5188-89.

<sup>22</sup> Although not relevant to the legal criteria of this Initial Decision it is noted that Normandy will retain its AM broadcast facility in Glens Falls which is the station that had the more favorable issues/programs lists. (See Para. 13, *supra*).

<sup>23</sup> While there was no substantive issue set against Normandy in the *HDO* for violations of the Commission's rule requiring issues/programs lists [47 C.F.R. §73.3526(a)(9)], failure to comply

with that rule was another evidentiary factor supporting the conclusion here that Normandy does not merit a renewal expectancy.

<sup>24</sup> There was no revocation proceeding commenced against Normandy's AM station for the *Skidelsky* violations and therefore Normandy's ownership of the AM station is not at risk in this proceeding. Cf. *United Broadcasting Co.*, 49 Radio Reg. 2d (P&F) 597, 602 (Comm'n 1981) (loss of one license does not require the denial of ownership of another licensee).

<sup>25</sup> This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(b).